(2)

Supreme Court, U.S.
FILED
MAY 1 - 2006
OFFICE OF THE CLERK

No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON, ET AL.,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PUBLIC CITIZEN, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Amicus Curiae

May 2006

QUESTION PRESENTED

Whether a private actor doing no more than complying with federal regulation is a "person acting under a federal officer" for the purpose of 28 U.S.C. § 1442(a)(1), entitling the actor to remove to federal court a civil action brought in state court under state law.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 3

REASONS FOR GRANTING THE WRIT 5

I. The Eighth Circuit's Holding That Federal Regulation Is Enough for Removal Under Section 1442(a)(1) Cannot Be Squared with the Statutory Language, this Court's Decisions, or Decisions of Other Circuits. 5

II. The FTC's "Regulation" of Cigarettes Was Not Uniquely or Even Unusually Extensive. 7

A. The FTC's Weak "Regulation" of the Cigarette Industry Did Not Compel Philip Morris to Take the Actions for Which It Has Been Sued. 7

B. Other Industries Face Much More Extensive, Specific, and Formal Regulation than Do Cigarette Companies. 10

C. Whether Broadly or Narrowly Applied, the Eighth Circuit's Ruling Will Have Mischievous Consequences. 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases:

Arizona v. Manypenny, 451 U.S. 232 (1981).....3, 5

Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788 (2005).....2

Blum v. Yaretsky, 457 U.S. 991 (1982).....6

Brown v. Philip Morris Inc., 250 F.3d 789 (3d Cir. 2001).....5-6

Craft v. Philip Morris Companies, Inc., 2006 WL 744415 (E.D. Mo. Mar. 17, 2006).....4

FDA v. Brown & Williamson, 529 U.S. 120 (2000).....2

FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985).....8

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).....6

King v. Provident Bank, __ F. Supp. 2d __, 2006 WL 902271 (M.D. Ala. April 6, 2006).....15

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).....2

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).....2, 11

Mesa v. California, 489 U.S. 121 (1989).....3

Parks v. Guidant Corp., 402 F. Supp. 2d 964 (N.D. Ind. 2005).....14, 15

Price v. Philip Morris Inc., __ N.E.2d __, 2005 WL 3434368 (Ill. Dec. 15, 2005).....2

Tennessee v. Davis, 100 U.S. 257 (1880).....3, 4

Tremblay v. Philip Morris, Inc., 231 F. Supp. 2d 411 (D.N.H. 2002).....4

United States v. Philip Morris, 263 F. Supp. 2d 72 (D.D.C. 2003) 9

Virden v. Altria Group, Inc., 304 F. Supp. 2d 832 (N.D. W. Va. 2004) 6

Willingham v. Morgan, 395 U.S. 402 (1969) 3, 5

Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996) 2

Statutes and Regulations:

15 U.S.C. § 45(a) 8

28 U.S.C. § 1442(a)(1) ..... *passim*

29 U.S.C. § 651 et seq. 13

49 U.S.C. § 30168 10

10 C.F.R. Part 430 12

16 C.F.R. Chapter II 13

16 C.F.R. Part 1616 13

16 C.F.R. § 1616.35(f) 13

21 C.F.R. § 800.20 12

21 C.F.R. § 801.410 12

21 C.F.R. § 801.420 12

21 C.F.R. § 801.430 12

21 C.F.R. § 801.435 12

40 C.F.R. Part 86 11

40 C.F.R. Part 600 11

49 C.F.R. Part 571 10

49 C.F.R. § 571.208 11

71 Fed. Reg. 10100 (Feb. 28, 2006) 13

S. Ct. R. 10(a) 5

Other:

FTC, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. 48158 (Sept. 12, 1997)..... 8-9

www.epa.gov/fueleconomy/index.htm (last visited April 28, 2006).....11

www.fueleconomy.gov/ (last visited April 28, 2006).....11

www.SaferCar.gov (last visited April 28, 2006) 10

www.tngenweb.org/monroe/news3.txt (last visited April 27, 2006).....3

INTEREST OF *AMICUS CURIAE*

Public Citizen, Inc., submits this brief as *amicus curiae* in support of the petition for certiorari in this case because the Eighth Circuit's decision directly implicates its interests in preserving consumer remedies under state law and defending the role of the state courts in providing such remedies.[1]

Public Citizen, Inc., is a consumer advocacy organization founded in 1971. On behalf of its approximately 100,000 members nationwide, Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues and works toward the enactment and effective enforcement of laws protecting consumers, workers, and members of the public generally. Public Citizen is particularly concerned with improving public health laws and regulations and with ensuring public access to the court system for the redress of injuries and illnesses caused by unsafe and defective products. As a result of these concerns, Public Citizen has an interest in both the substantive and procedural aspects of litigation involving cigarettes and other tobacco products, which have caused grievous illness and injury to so many people. More generally, Public Citizen seeks to counter the misuse of procedural devices such as removal as well as the substantive defense of implied preemption, both of which increasingly are invoked by defendants in a range of litigation involving public health and safety to burden plaintiffs and escape liability under state law.

For these reasons, Public Citizen sought and was granted leave to file an *amicus* brief in this case in support of the petition for rehearing in the Eighth Circuit. Public Citizen has also appeared as amicus curiae in many cases involving to-

---

[1] Letters of consent to the filing of this brief from all parties have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to preparation or submission of this brief.

bacco, including *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), *FDA v. Brown & Williamson*, 529 U.S. 120 (2000), and *Price v. Philip Morris Inc.*, __ N.E.2d __, 2005 WL 3434368 (Ill. Dec. 15, 2005). In addition, Public Citizen and its attorneys have participated in numerous appellate cases in which defendants raised preemption defenses, including *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), and *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005).

The panel's opinion implicates Public Citizen's concerns in a number of respects. Public Citizen believes that the Eighth Circuit's decision places an unwarranted procedural obstacle in the way of plaintiffs asserting state-law tort claims in state courts by cloaking cigarette companies in the guise of federal government actors and providing them the same right to remove a case to federal court as a federal officer sued for actions under color of his office. Moreover, by treating a company that is merely subject to some federal *regulation* as if it were a federal officer or agency itself, the Eighth Circuit's opinion is likely to give rise to many more removal attempts as other companies—many subject to much greater federal regulation than the tobacco industry—seek to take advantage of the court's expansion of the federal officer removal statute by asserting that they, too, were acting at the direction of federal officers and are being sued for actions under color of federal office.

Public Citizen believes that a brief reflecting its perspective may assist the Court in determining whether review of the Eighth Circuit's novel opinion is warranted. In particular, Public Citizen believes it may be useful to the Court to receive detailed information about how the supposedly "unusual" and "unique" regulation of cigarettes by the Federal Trade Commission compares to the much more extensive and detailed regulation of other products by other federal agencies. That information demonstrates that, far from justifying a special status for cigarette companies as federal agents enti-

tled to remove actions against them to federal court, the nature of the FTC's interactions with cigarette companies provides no basis for singling them out for special protections unavailable to other industries that are, in fact, more heavily regulated.

INTRODUCTION

In May 1878, federal internal revenue agent James Davis raided a moonshine still in the hills near Tracy City, Tennessee. Before he and his companion could destroy the still, seven armed men attacked them. Returning fire, Davis killed one of his assailants, wounded another, and captured a third, but he was forced to retreat without destroying the still. According to a contemporary newspaper account, the raid caused "intense excitement" in the neighborhood.[2]

A local grand jury indicted Davis for murder. With the support of the Attorney General of the United States, Davis invoked the predecessor to 28 U.S.C. § 1442(a)(1) and removed the case to federal court on the ground that he had acted in the discharge of his duties as a federal officer and was immune from state prosecution. In *Tennessee v. Davis*, 100 U.S. 257 (1880), this Court affirmed the removal, holding that because the federal government "can act only through its officers and agents," the ability to remove state court actions brought against federal officers and agents for actions within the scope of their duties was essential to the vindication of federal authority. *Id.* at 263. The Court has repeatedly pointed to *Davis* as exemplifying the core purposes of § 1442(a)(1)'s authorization for removal of cases by federal officers and persons acting under their direction who are sued in state court for the performance of official acts. *See, e.g., Mesa v. California*, 489 U.S. 121, 126-27 (1989); *Arizona v. Manypenny*, 451 U.S. 232, 241 n.16 (1981); *Willingham v. Morgan*, 395 U.S. 402, 406 (1969).

---

[2] www.tngenweb.org/monroe/news3.txt.

This case is a far cry from *Davis*. Here, the Philip Morris Company, a purely private enterprise, has been sued for fraudulently misrepresenting the hazardous nature of its products—so-called "light" cigarettes. There is no claim that, in promoting and selling its cigarettes, Philip Morris was carrying out any official function of the United States. Rather, the company's claim to removal, which was accepted by the Eighth Circuit, rests solely on the supposed "regulation" of certain aspects of the cigarette industry's activities by the Federal Trade Commission, as a result of which Philip Morris claims to have been "acting under" a federal officer.[3]

The Eighth Circuit's decision departs from all previous federal appellate case law on federal officer removal by permitting removal based solely on the extent of federal regulation of private business activity that is not otherwise performed for the benefit of the federal government. The justification offered by the Eighth Circuit and parroted by Philip Morris—that the FTC's regulation of cigarette companies is so "unusual" or, indeed, "unique" as to justify treating cigarette makers as if they were federal agents—is patently wrong. Many industries are subject to much more detailed and extensive regulation than the cigarette industry. Thus, if the Eighth Circuit's reasoning were extended beyond cigarette companies, its decision could result in a tremendous expansion of federal removal jurisdiction.

It may well be that, as Philip Morris predicts, *see* Br. in Opp. 18-20, other courts will shrink from applying the Eighth

---

[3] Philip Morris seems to have discovered that it was "acting under" a federal officer surprisingly late in the game, given its assertion that there is a long and unique history of federal regulation of its activities: The first reported decision in a case where a cigarette company claimed federal officer removal did not come until 2002, *see Tremblay v. Philip Morris, Inc.*, 231 F. Supp. 2d 411 (D.N.H. 2002), and even in the Eighth Circuit some of Philip Morris's attempted removals on this ground have recently been held untimely. *Craft v. Philip Morris Companies, Inc.*, 2006 WL 744415 (E.D. Mo. Mar. 17, 2006).

Circuit's reasoning outside of the cigarette industry, so that the decision below will benefit only Philip Morris and other cigarette companies. But that will result in an equally significant distortion of federal law: A special dispensation will be granted to the very industry whose claim to such an indulgence is weakest. Either way, the decision below "has so far departed from the accepted and usual court of judicial proceedings ... as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a).

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Holding That Federal Regulation Is Enough for Removal Under Section 1442(a)(1) Cannot Be Squared with the Statutory Language, this Court's Decisions, or Decisions of Other Circuits.

The federal officer removal statute, 28 U.S.C. § 1442(a)(1), provides for removal when "any officer (or any person acting under that officer) of the United States or any agency thereof" is sued in a state court "for any act under color of such office." On its face, the statute requires not only that the *actor* who is sued be an officer or person acting under him, but also that the *action* for which he is sued be an official one—that is, an act under color of office. The under-color-of-office requirement is a critical limitation of the statute, integral to its core purpose of providing for removal "broad enough to cover all cases where *federal officers* can raise a colorable defense *arising out of their duty to enforce federal law*." *Willingham*, 395 U.S. at 406-07 (emphasis added); *see also Arizona v. Manypenny*, 451 U.S. at 241 ("[R]emoval under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a *federal official* is entitled to raise a defense *arising out of his official duties.*") (emphasis added).

Whatever selling cigarettes may be, it is not action *under color of federal office*. *See Brown v. Philip Morris Inc.*, 250

F.3d 789, 801 (3d Cir. 2001) (accepting Philip Morris' argument that federal regulation of its marketing practices did not make its actions "under color of federal law" for purposes of a *Bivens* action). The Eighth Circuit departed from the words of the statute, the precedents of this Court, and the decisions of other circuits by extending removal to a lawsuit based on the defendant's purely self-interested private conduct just because it was subject to some federal regulation. This Court has made clear that even "extensive" regulation of the activities of a business does not make its actions under color of law; rather, a private person acts under color of law only when its action "may be fairly treated as that of the [government] itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *accord Blum v. Yaretsky*, 457 U.S. 991 (1982). For the same reason, removal of suits based on actions taken by federal officers or their subordinates under color of office is properly limited to cases where the removing defendant was "effectively an agent or employee of the government" performing "official functions" on its behalf. *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 846, 845 (N.D. W. Va. 2004).

In its attempt to defend the decision below, Philip Morris cites *not a single case* where another federal court of appeals has permitted removal by a defendant who was not performing some function on behalf of the federal government. Each appellate case cited by Philip Morris involved a defendant who acted as a de facto or de jure agent of the federal government or otherwise performed some federal function for or on behalf of the government, whether it be implementing a federal wiretap, participating in a federal undercover law enforcement operation, inspecting airplanes on behalf of the federal government, supplying war material to the military, or carrying out a federal environmental cleanup operation. *See* Br. in Opp. 11-13 (citing cases). As petitioner explains (Pet. 9-17), the cases from other circuits employ divergent standards for determining when removal is appropriate, but

the key point is that Philip Morris's conduct in marketing "light" cigarettes would not qualify for removal under *any* of the case authority from other circuits.

II. The FTC's "Regulation" of Cigarettes Was Not Uniquely or Even Unusually Extensive.

Recognizing that "mere participation in a regulated industry is insufficient" to support removal, Br. in Opp. 14, Philip Morris attempts to defend the Eighth Circuit's decision on the ground that the regulation to which it was subject was "unusual" and so "unique" as to differentiate Philip Morris from other regulated businesses and justify a special rule of removal for cigarette cases. Br. in Opp. 10. But the Eighth Circuit's characterization of the regulation of cigarette companies as "unprecedented," on which Philip Morris relies, Br. in Opp. 18, is itself so baseless as to call for correction by this Court. Left standing, the decision below will lead either to a potentially vast expansion of federal officer removal, as other more heavily regulated businesses seek the same benefit afforded Philip Morris by the Eighth Circuit, or to a completely unprincipled special rule benefiting only the cigarette industry.

A. The FTC's Weak "Regulation" of the Cigarette Industry Did Not Compel Philip Morris to Take the Actions for Which It Has Been Sued.

Philip Morris, echoing the Eighth Circuit's opinion, is long on adjectives characterizing the supposedly extensive regulation to which it was subjected by the FTC. *See* Br. in Opp. 3-6. The undisputed, public-record facts, however, fall far short of justifying those characterizations. Indeed, they fail to do so *as a matter of law*. The critical points, which are not subject to dispute, are:

- The FTC has *never* promulgated regulations requiring cigarette makers to test the tar and nicotine levels of cigarettes, let alone regulations defining how such tests

must be conducted, how the results must be disclosed, or how test results may be used in cigarette advertising.

- The major cigarette makers' adherence to the FTC method of testing cigarettes was the result of a voluntary agreement they entered into to stave off formal regulation and/or enforcement actions under the FTC's general authority to sanction "unfair or deceptive acts or practices in or affecting commerce" under § 5 of the FTC Act, 15 U.S.C. § 45(a). *See* FTC, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. 48158 (Sept. 12, 1997).

- Absent agreement by the manufacturers to use the FTC's test method, the FTC could not, as a matter of law, foreclose use of other methods unless it could prove that advertising their results would be unfair or deceptive under the FTC Act. As the D.C. Circuit held in *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 44 (D.C. Cir. 1985), "[b]ecause the FTC has not adopted its system of testing pursuant to a Trade Regulation Rule under section 18 of the FTC Act, 15 U.S.C. § 57a (1982), one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette."

- Although Philip Morris, following the Eighth Circuit's lead, insists that the FTC "'formally defined' 'low tar' cigarettes as those measuring 15 milligrams or less in tar according to the FTC Method," Br. in Opp. 5, neither Philip Morris nor the court below can cite any FTC regulation or other "formal" action of the Commission embodying such a definition. As the Commission itself has stated, "Cigarette manufacturers use a number of descriptive terms (such as 'low tar,' 'light,' 'medium,' 'extra light,' 'ultra light,' 'ultra low,' and 'ultima') in advertising and labeling information about their cigarettes. ... *There are no official definitions for these terms* but they appear to be used by the industry to re-

flect ranges of FTC tar ratings." FTC, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. at 48163 (emphasis added).

- The most that can be said is that the FTC at one point followed an *informal* enforcement policy of not taking action against cigarette companies that advertised cigarettes as "light" or "low tar" based on test results using the Cambridge method; but as Philip Morris itself acknowledges, the Commission has more recently begun an investigation, as yet unresolved, of whether such advertising is deceptive. Br. in Opp. 6.
- The United States is currently suing Philip Morris and other cigarette manufacturers for precisely the conduct that Philip Morris insists in this case it undertook as an agent of the federal government acting under color of federal office. The district court in that case has rejected the defendants' argument that they were merely following FTC mandates, noting that the advertisements in which they suggested that "light" cigarettes were less hazardous "*were certainly not mandated by the FTC.*" *United States v. Philip Morris*, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) (emphasis added).
- Most importantly, whatever the FTC may or may not have "directed" Philip Morris to do, Philip Morris does not claim—because it cannot—that the FTC ever *required* it to sell "low tar" cigarettes, or *compelled* it to call its cigarettes "lights," or otherwise *ordered* it to use advertising that would mislead consumers by suggesting, on the basis of measured tar and nicotine levels, that "light" cigarettes are somehow healthier than "regular" cigarettes.

B. Other Industries Face Much More Extensive, Specific, and Formal Regulation than Do Cigarette Companies.

The "regulation" of cigarette testing and advertising by the FTC is by no means "unique," "extraordinary" or "unusual" in its intrusiveness. Indeed, federal regulatory actions are typically much more formal and prescriptive than the FTC's actions regarding cigarettes. And although it may have been "unprecedented" *for the FTC* to involve itself in product testing to the degree it did with cigarettes (Br. in Opp. 18), detailed federal product-testing mandates are common, and are usually set forth in regulations with the force of law rather than adopted informally and by agreement with regulated companies, as in the case of the FTC's cigarette testing regime.

The National Highway Traffic Safety Administration (NHTSA), for example, conducts its own program of crash and rollover testing of automobiles, gives vehicles one- to five-star ratings as a result, and tells car manufacturers how to use those ratings in automobile advertising. *See* www.SaferCar.gov. NHTSA's testing activities, which are at least as extensive as the FTC's, are carried out not pursuant to voluntary agreements or informally adopted policies, but under a specific statutory mandate. 49 U.S.C. § 30168.

Moreover, unlike the FTC, NHTSA does more than merely test vehicles and instruct automakers concerning the use of those test results in advertising. It also formally promulgates specific design and performance standards for vehicles, known as Federal Motor Vehicle Safety Standards (FMVSSs). Those mandatory standards, codified at 49 C.F.R. Part 571, fill approximately 700 pages of the Code of Federal Regulations. FMVSSs typically specify not only what safety features manufacturers are required to install in vehicles and what standards of protection they must provide, but also exactly how manufacturers must *measure* their performance. For example, NHTSA's standard governing seatbelts and air-

bags, 49 C.F.R. § 571.208, which by itself is 87 pages long, prescribes exactly what crash tests manufacturers must conduct to test their passenger protection systems, including the speed and angle at which vehicles must be crashed, the forces that must be measured, and the precise "anthropomorphic test devices" (*i.e.*, crash-test dummies) that must be used.

Similarly, EPA regulations define exactly how automakers must test the fuel economy of their vehicles, and further provide for testing by the agency itself of a significant percentage of vehicles as a double-check on the manufacturers' own testing. *See generally* www.epa.gov/fueleconomy/index.htm; www.fueleconomy.gov/. Again, unlike the FTC's cigarette testing program, fuel economy testing is mandated by regulations with the force of law. *See* 40 C.F.R. Parts 86 & 600. And those regulations not only specify precisely how automakers must disclose fuel economy test results to consumers, but also define fleet fuel economy performance standards (CAFE standards) that the automobile industry is *required by law* to meet.

Such regulation is hardly confined to the automobile industry. Drug and medical device manufacturers must comply with standards governing the approval and marketing of new drugs and medical devices. Once approved, drugs and devices are subject to formal regulations that define their formulation and design and the manufacturing practices to which their makers must conform, as well as the precise contents of their labels. *See generally Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). Again, the regulatory scheme for drugs and medical devices differs from the FTC's cigarette testing program both in that it involves regulations with the force of law, and in that it directly regulates product design and production.

FDA regulations also set forth detailed product testing requirements that manufacturers are legally required to follow. For instance, the FDA has promulgated a regulation prescribing in detail how surgical gloves must be tested for

leaks, which calls not only for testing by manufacturers, but also for sampling and testing by the agency itself. 21 C.F.R. § 800.20. Unlike the FTC's test program for cigarettes, the FDA's testing has teeth: gloves that fail are "adulterated within the meaning of section 501(c) of the Federal Food, Drug, and Cosmetic Act, and are subject to regulatory action, such as detention ... and seizure ...." *Id.* § 800.20(d).

The FDA's glove regulation is by no means unusual. Other FDA regulations provide detailed testing and labeling requirements for tampons, 21 C.F.R. § 801.430, impact-resistant eyeglass lenses, *id.* § 801.410, hearing aids, *id.* § 801.420, and condoms. *id.* § 801.435. The tampon regulation, for example, requires manufacturers to use an absorbency test conforming to the detailed descriptions and diagrams set forth in the regulatory text, and to report the results on package labels using specifically defined terms. Again, the regulation has the force of law, and any noncomplying tampons are "misbranded" within the meaning of the Food, Drug, and Cosmetic Act.

Other consumer products are also subject to detailed regulatory testing regimes. Under regulations promulgated by the Department of Energy, 10 C.F.R. Part 430, manufacturers of refrigerators, freezers, dishwashers, water heaters, clothes washers and dryers, air conditioners, television sets, home heating equipment, kitchen ranges and ovens, fluorescent light tubes, showerheads, faucets, and toilets must use prescribed test methods to measure the energy and water consumption of their products. And unlike the FTC's cigarette testing program, the Energy Department's regulations not only require product testing, but also require that the products meet specific energy and water conservation standards.

The Consumer Product Safety Commission (CPSC), in addition to engaging in voluntary efforts to improve product safety similar to the FTC's interactions with cigarette companies, also promulgates mandatory safety standards for consumer products, ranging from bicycle helmets to lawn mow-

ers to cigarette lighters to baby cribs. Mandatory CPSC standards are formally promulgated as regulations and published in 16 C.F.R. Chapter II. Typically, they set forth design and/or performance standards that manufacturers are required to meet, and specify the exact test methods that must be used to determine compliance.

The CPSC's standards for flammability of children's sleepwear (sizes 7 through 14) are illustrative. The standards, set forth at 16 C.F.R. Part 1616, occupy 30 pages of the Code of Federal Regulations, and specify not only what criteria affected products must meet and how they must be labeled, but also how manufacturers must sample fabric for testing, how the testing must be conducted (including eight pages of engineering drawings describing the test chamber), what records the manufacturer must keep, the Commission's enforcement policy, the role of the Commission itself in testing, and the consequences of noncompliance. As to the latter, the regulations state that "[t]he Commission will test fabrics and garments subject to the standard for compliance with the standard ... [and] will consider any failing results from compliance testing as evidence of a violation of the standard and section 3 of the Flammable Fabrics Act (15 U.S.C. § 1192)." 16 C.F.R. § 1616.35(f).

As a final example, the Occupational Safety and Health Administration (OSHA), pursuant to the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq., formally promulgates regulations requiring employers to limit the exposure of their workers to hazardous substances and conditions. Those standards, which have the force of law, typically specify not only precise exposure limits, but also means of compliance and specific methods for exposure testing. For example, OSHA's recently promulgated rule on exposure to hexavalent chromium, 71 Fed. Reg. 10100 (Feb. 28, 2006), not only prescribes a precise exposure limit (5 micrograms of hexavalent chromium per cubic meter of air as an eight-hour time-weighted average), but also defines exactly the testing that

employers must use to determine compliance: "the employer shall use a method of monitoring and analysis that can measure chromium (VI) to within an accuracy of plus or minus 25 percent (+/- 25%) and can produce accurate measurements to within a statistical confidence level of 95 percent for airborne concentrations at or above the action level." *Id.* at 10375. In addition to requiring employers to monitor their compliance using specified methods, OSHA itself periodically tests employer compliance, and violation of its regulations can result in administrative sanctions.

We could go on. The point is that federal regulation of business activity is ubiquitous, and regulations that impose detailed testing and compliance requirements are commonplace. Indeed, if anything is "unique" and "unusual" about the FTC's testing of cigarettes, it is that it has *not* been imposed by regulations with the force of law, that it does *not* involve enforcement of any design or performance standards regarding the regulated products, and that it involves *no* enforceable regulations concerning the use of test results in cigarette advertising or marketing. No one who knew anything about federal regulation could possibly credit Philip Morris's (and the Eighth Circuit's) view that the "regulation" of cigarette companies by the FTC is "uniquely," "extraordinarily," or even "unusually" extensive.

C. Whether Broadly or Narrowly Applied, the Eighth Circuit's Ruling Will Have Mischievous Consequences.

Precisely because the federal "regulation" of cigarette testing and marketing has been so feeble compared to other federal regulatory regimes that impose enforceable legal requirements on their subjects, the Eighth Circuit's ruling is likely to lead other regulated businesses who are sued by consumers injured by their products to claim that they, too, "acted under" a federal officer. Indeed, medical device manufacturers have already done so, *see Parks v. Guidant Corp.*, 402 F. Supp.2d 964 (N.D. Ind. 2005), as have banks claiming

to be acting under federal officers by virtue of federal regulation of their lending practices. *See King v. Provident Bank*, __ F. Supp. 2d __, 2006 WL 902271 (M.D. Ala. April 6, 2006).

If the Eighth Circuit's decision remains intact, a number of undesirable consequences are likely. Courts that are persuaded by its view that mere regulation, if extensive enough, can justify removal, and that undertake a serious comparison of the degree of regulation faced by defendants in other industries with that faced by cigarette companies, may allow a broad range of defendants to remove cases under § 1442(a)(1), dramatically expanding the scope of federal removal jurisdiction. Alternatively, courts may grasp at the lifeline offered by the Eight Circuit's characterization of the Philip Morris case as "unique," "unusual," "extraordinary," and "unprecedented" and reject removal by defendants outside the cigarette industry even though, in reality, they face regulations much more extensive than cigarette companies. The district court's decision in *Parks* reflects the latter approach (as well as open skepticism as to the correctness of the Eighth Circuit's ruling).

It may be, as Philip Morris predicts, that the latter approach will predominate. We certainly hope so. But even if courts decline to extend the Eighth Circuit's unwise holding to other industries, much time and effort will be expended litigating meritless removals. And, at the end of the day, the cigarette companies will be left with a special benefit not available to other more heavily regulated (and less culpable) industries. A decision creating an unprincipled exception to ordinary jurisdictional rules for the benefit of a single industry should not be left standing by this Court.

CONCLUSION

Most people, including most lawyers, would probably be surprised if not shocked to learn that Philip Morris had successfully availed itself of a removal provision designed for

protection of federal officers, employees, and agents. Their incredulity would only be heightened by the facts that the federal government is itself suing Philip Morris for the very actions the company claims were done under federal direction, and that the government has shown no sign of supporting Philip Morris's entitlement to removal (unlike most other federal officer removal cases heard by this Court, where the United States *represented* the removing party). And the assertion that cigarette companies are entitled to removal because they have faced more extensive regulation than other industries would seem merely laughable—if it had not been accepted by a United States Court of Appeals.

For the reasons stated above, and by the petitioner, the Eighth Circuit's decision merits review and correction. The petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Amicus Curiae

Date: May 2006